77-09

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

ROBERT A. PANORA, Registrar of Motor Vehicles of the Commonwealth of Massachusetts,
Appellant,

v.

DONALD E. MONTRYM, et al.,
Appellees,

On Appeal From the United States District Court for the District of Massachusetts

MOTION TO AFFIRM

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Now come Donald E. Montrym and all members of the class certified by the district court and move this Court to affirm the judgment of the three-judge district court entered on May 4, 1977[1] for the reasons set forth below.

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1. See Appellant's Jurisdictional Statement pp. 24a and 25a.

STATUTES INVOLVED

Although G.L. Ch. 90 §24(10(f) was the state statute declared unconstitutional by the district court, a proper understanding of the legal issues in this case cannot be resolved without consideration of the companion §24(1)(g) which reads:

> Any person whose license, permit or right to operate has been suspended under paragraph (f) shall be entitled to a hearing before the registrar which shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which the public has a right of access or upon any ways or in any place to which members of the public have a right of access as invitees or licensees; (2) was such person placed under arrest, and (3) did such person refuse to submit to such

> test or analysis. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall reinstate such license, permit or right to operate.

QUESTIONS PRESENTED

A more complete statement of the question presented by this appeal would be as follows:

Where the Registrar of Motor Vehicles affords a "prompt" post-suspension hearing, must he provide some "opportunity to respond" prior to his revoking, on the basis of police affidavits, a licensee's right to drive for failure to take the breathalyzer test pursuant to G.L. Ch. 90 §24(1)(f) and (g)?

STATEMENT OF THE CASE

The Registrar's statement of the case is deficient in a multitude of facts which are necessary to judge the issues which he raises. A more complete version is set forth by the district court in its opinion set out in Appendix A, pps. 3a-6a to appellant's jurisdictional statement.

ARGUMENT

No question exists concerning the importance and impact of the decision below, not only in Massachusetts, but in the other state jurisdictions having "implied consent" statutes similar to G.L. Ch. 90 §24(1)(f) and (g). Undoubtedly, and as a result of this decision, the issue is being litigated in other jurisdictions. The effect of the decision, and, in particular the injunction issued by the three-judge court, was to knock out the "breathalyzer test". Additionally, the Registrar was forced pursuant to a contempt proceeding to return approximately one thousand motor vehicle licenses to alleged drunk drivers.

As the Registrar observes,[2] the issue presented has sharply divided state and federal courts. All of the highest state courts that have viewed the problem have sustained the prior consent laws and their attendant summary revocation procedures from constitutional attack. Of the state cases

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2. See Appellant's Jurisdictional Statement pp. 10-11.

cited in his footnotes 6 and 8, the Registrar should have included Craig v. Commonwealth of Kentucky, 471 SW 2d 11 (1971) and Robertson v. Oklahoma, 501 P 2d 1099 (1972)[3]. Of all the state court decisions, there has been only one dissent. See Judge Osborn's opinion in Craig v. Commonwealth of Kentucky, supra, at p. 15. On the other hand, every federal court that has reviewed the state statutes, has struck them down as violating the due process clause. Besides the instant case, see Slone v. Kentucky Department of Transportation, 379 F. Supp. 652 C.E.D. Ky. (1974); Chavez v. Campbell, 397 F. Supp. 1285 (D. Ariz. 1973); and Holland v. Parker,

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3. Although Ballou v. Kelley, 176 N.Y.S. 2d 1005 (1958) and Campbell v. Superior Court, 106 Ariz. 542 (1971) upheld statutes similar to the one in issue, these decisions were prior to Bell v. Burson, 402 U.S. 535 (1971). Likewise, the Registrar's reliance on Glass v. Commonwealth, 460 PA 362 (1975) and Harrison v. State Dept. of Public Safety, 298 So. 2d 312 (1974) is equally misplaced.

354 F. Supp. 196 (1973). Of all the ten federal jduges that passed on the issue, only one, Judge Campbell in the instant case, has dissented.[4]

The decisions of the highest state courts manifest state institutional interests, and the decisions of the lower federal courts manifests the federal interest in the protection of federal rights. In terms of logic, the state decisions are barren, excepting a false precipice based upon the emergency doctrine. Only Craig v. Commonwealth of Kentucky, supra,[5] touches

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4. Judge Campbell was a Massachusetts legislator, assistant attorney general, and superior court judge, prior to his appointment as a federal judge.

5. "Balancing the public interest with the entitlement of the individual to operate a motor vehicle and in light of the requirement for an accelerated determination of the claimed violation, we hold that the procedure provided in KRS 186.565 is a valid exercise of the police power" - Craig v. Commonwealth of Kentucky, supra, at. p.5.

the point pressed by the Registrar. On the other hand, the Federal decisions reflect the logical application of Bell v. Burson, 402 U.S. 535 (1971), and the succeeding companion cases of this Court. The decisions in Slone, Chavez, Holland and the instant case speak for themselves and not much can be added to their well reasoned and thorough opinions.

Some comment of Judge Campbell's dissenting opinion is appropriate. He would cast aside as irrelevant Mr. Montrym's claim of innocence. He would ajudge Mr. Montrym guilty on the basis of police form affidavits and sustain such a procedure on the grounds that the Registrar gives a deprived licensee a prompt opportunity thereafter to prove himself innocent. Further, Judge Campbell would give credence to the Massachusetts Legislature's judgment that the trial by affidavit procedure is necessary to coerce motorists to take the breathalyzer test. With all due respect, Mr. Montrym traverses Judge Campbell's thesis that the threat and imposition of instant punishment is necessary to enforce

obedience to state laws.[6] Indeed, if there is any reason why this Court should give plenary consideration to this matter, it should be that Judge Campbell's dissent should not remain unanswered.

To conclude, Mr. Montrym's position is that the federal decisions deciding this issue are correct, and he asks this Court to support those judges who have had the courage and conviction to strike down these unconstitutional statutes fully realizing the impact of their decisions.

Respectfully submitted,

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6. Nowhere does Judge Campbell or any of the state court decision explain why a hearing cannot be provided prior to suspension. Compare Harrison v. State Dept. of Public Safety, 296 Minn. 238, 207 NW 2d 541 (1973).